89-846

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1989 Term

GUILLERMO SUAREZ, Petitioner,
vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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(813) 223-6048
Counsel for Petitioner

The Petitioner, Guillermo Suarez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 24, 1989.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Middle District of Florida committed reversible error by violating the express terms of Rule 30 of the Federal Rules of Criminal Procedure, and whether the decision of the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a course by the Federal District Court, as to call for an exercise of this Court's power of supervision, by failing to reverse the Federal District Court's violation of Rule 30.

2. Whether the United States District Court for the Middle District of Florida abused its discretion by failing to allow the Petitioner/Defendant, Guillermo Suarez, sufficient time to prepare his closing argument in the trial of the cause, and whether the decision of the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision, by failing to reverse the Petitioner's conviction based upon the inadequate time allowed for the preparation of the closing arguments.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Middle District of Florida. However, a copy of the judgment and sentence rendered by that Court against Petitioner/Defendant, Guillermo Suarez, is attached in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 24, 1989. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this petition is Rule 30, Federal Rules of Criminal Procedure which provides as follows:

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the Court reasonable directs any party may file written requests that the Court instruct the jury on the law as set forth in the request. At the same time, copies of such requests shall be furnished to all parties. The Court shall inform counsel of its proposed action on the request prior to their arguments to the jury. The Court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, the presence of the jury. (emphasis supplied)

STATEMENT OF THE CASE

Petitioner, Guillermo Suarez, was indicted for three counts of tax evasion on April 6, 1988. Count I of the Indictment charged Dr. Suarez with a violation of 26 USC §7201 for attempting to defeat or evade his personal taxes for the year 1981. Count II involved a similar charge for the year 1982 and Count III likewise involved a charge for tax evasion for the tax year 1983.

The jury trial commenced on July 6, 1988, before the Honorable William Castagna, three months after return of the indictment. The trial lasted until July 25, 1988, or for approximately fourteen (14) trial days. On Monday, July 25, 1988, the jury returned a verdict of not guilty as to Count I, and guilty as to Counts II and III. On October 7, 1988, the District Court sentenced Dr. Suarez as to Count II to imprisonment for a period of six (6) months. As to Count III,

he was sentenced to a term of imprisonment for a period of three (3) years, imposition of which was suspended. Dr. Suarez was placed on probation for a term of five (5) years, with the condition that he pay a fine of $50,000.00 within six (6) months and with the further condition that he contribute 500 hours of community service per year during the period of probation. Dr. Suarez timely filed a Notice of Appeal from the judgment and sentence rendered on October 7, 1988.

On August 7, 1988, oral arguments were held in the Eleventh Circuit Court of Appeals. Thereafter, on August 24, 1989, the Eleventh Circuit entered its per curiam affirmance of the judgment and sentence of the District Court. This Petition for Certiorari was timely filed thereafter.

During the trial, the Petitioner presented numerous witnesses on his behalf. After the last such witness testified, the

defense rested. The government then announced there would be no rebuttal. Counsel and the Court then discussed the scheduling of closing arguments. The discussions were taking place on Thursday, July 21, 1988, just prior to 3:00 p.m. After the Court indicated the possibility of wrapping up both the instructions and the closing arguments on that day, defense counsel requested that arguments not be held on that day, in order to fully prepare for closing as well as to fully discuss the proposed jury instructions. Defense counsel specifically requested that arguments not be held that day. Despite defense counsel's statement that he was not prepared to proceed at that time, the Court decided to adhere to its schedule.

The Court then recessed from 2:55 p.m. until 3:10 p.m. Immediately after recess, the Court presented counsel with its proposed

instructions. Some of these were standard instructions, some of these were instructions which had been requested by the defense, but none of these instructions were numbered as they had been when they were proposed by the Petitioner or the Government. At the time they were presented to defense counsel, it was impossible to determine, without first reading through them and comparing them to counsel's own proposed instructions, whether they were one of the defenses requested instructions, a standard instruction, some different type of instruction, or one of the Court's own instructions. As a result, it was impossible for defense counsel at that moment to determine whether he wanted to object to any of the given instructions or not. Defense counsel immediately voiced objection to not having had a chance to review the instructions prior to being

required by the Court to accept, or reject them.

After proceeding through the first few proposed instructions, defense counsel again objected to the manner in which the instructions were being presented, i.e., without being given an adequate opportunity to review them, prior to being made to accept or reject them. The crucial issue in this case was whether the alleged taxable income was in fact taxable income, or whether such payments were loans and or repayments of loans to the Petitioner. Therefore the instructions pertaining to the definition of loans was crucially important. Court and counsel had a discussion concerning instruction D-D, pertaining to the definition of loan, particularly concerning the intent to repay element of that instruction. The Government requested an insertion of language that if there was no intent to repay, there

was not a loan. The Court at this time, prior to closing arguments, declined to make such an insertion. The Court would later, after closing arguments, make the insertion.

After discussing other instructions, but before completion of the charge conference and before it had ruled on all of the proposed or requested instructions, the Court decided to proceed with closing arguments to "keep our schedule". The Court announced that closing arguments would start then, on Thursday afternoon, and that the Court would reconvene the next morning, Friday, the 23rd, at which time the charge conference would be "concluded".

The Government then began its closing arguments. After that the Court took a brief recess from 4:55 p.m. to 5:10 p.m. The defense then made its closing argument. The Government then made its final closing argument. The Court then adjourned for the

day, Thursday, July 21, 1988, at 7:05 p.m.

On the next morning, Friday, July 22, 1988, the Court resumed work on its proposed instructions. Court and counsel then discussed again Instruction D-D, concerning the definition of loan. The Government's counsel again requested the insertion of the following language:

> "However, merely denominating a transaction as a loan is not sufficient to make it such and where there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such."

The Court then agreed to insert such language, and did in fact charge the jury with said language when it gave the loan instruction. Defense counsel maintained his objection to the insertion.

Thereafter the Court instructed the jury, and they began their deliberations. During deliberations, the jury came back with an inquiry. The jury informed the Court that

it was unable to reach a unanimous decision. The Judge asked whether continued deliberations might enable the jury to reach a verdict, to which the foremen replied that a weekend recess might enable it to do so. In response, the Court recessed on Friday, July 22, 1988 at 5:00 p.m. to reconvene on Monday morning, July 25, 1988. After a short period of deliberation on Monday morning, the jury reached its verdict.

The basis for Federal jurisdiction in the Court of first instance was an indictment for tax evasion and violation of Title 26 of the United States Code; 18 U.S.C. 3231.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

1. The decisions below are contrary to the express provisions of Rule 30 of the Federal Rules of Criminal Procedure, which requires the Court to inform counsel of its proposed action on jury instruction requests prior to counsel's arguments to the jury.

Rule 30 of the Federal Rules of Criminal Procedure states that "the Court shall inform counsel of its proposed action on the request [for instructions] prior to their arguments to the jury" (emphasis added).

This Rule gives the Court considerable latitude about when it may instruct a jury, either before or after closing argument. But, in contrast, Rule 30 uses mandatory language concerning informing counsel of the instructions prior to closing. The intent of the Rule is clear: To permit counsel to know what the instruction will be, so that counsel may tailor his presentation accordingly. See United States vs. Smith, 789 F.2d 196, 202 (3rd Cir. 1986); United States vs. Bowman, 798 F.2d 333 (8th Cir. 1986). By interrupting the charge conference, in its haste to "keep [its] schedule", to proceed with closing arguments, and then changing the crucial definition of loan instruction after

closing, the Court deprived defense counsel of the chance to tailor his closing arguments to the instructions given, contrary to Rule 30. Had counsel known the Court was going to water down the loan definition by inserting the language about "merely denominating a transactional loan does not make it one, etc." he would have addressed more thoroughly the intent-to-repay aspect of the facts. Significantly, the Court refused to insert such language prior to closing arguments. Defense was effectively misled as to this crucial instruction, and emphasized other aspects of the facts more than the good faith intent to repay issue in closing.

Changing such a crucial instruction after closing arguments prejudiced Defendant by preventing him from addressing with sufficient emphasis the good faith intent to repay issue at closing. The required showing of prejudice is manifest in this record.

United States vs. Cardell, 550 F.2d 604 (10th Cir. 1977). In any event, the procedure followed by the Trial Court, and approved by the Circuit Court of Appeals, is contrary to the express mandatory provisions of Rule 30, which require that counsel be informed prior to closing of the Court's proposed action on the instructions requested. The Trial Court violated Rule 30 not only by changing the loan instruction after closing arguments, but also by failing to even complete the charge conference prior to requiring counsel to give their summations. Even if the loan instruction had not been changed, counsel obviously had no way of knowing what the Court was going to do on the other requested instructions, since they had not even been addressed until after closing.

Petitioner should be granted a Writ of Certiorari because the Supreme Court has the primary responsibility for the proper

functioning of the Federal judiciary. The frequent grant of certiorari in cases involving Federal jurisdiction, practice, and procedure reflects that responsibility. Rule 19 of the Supreme Court Rules also recognizes the appropriateness of the grant of certiorari in the type of case where the Federal Appellate decision has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision. The instant case is just such a case, where the Trial Court has departed from the express requirements of Rule 30, and the Appellate Court has apparently sanctioned such a departure. Among the cases falling within the category deserving of certiorari review are those involving the administration of criminal justice in the Federal courts. See McNabb vs. United States, 318 U.S. 332,

341; Marshall vs. United States, 360 U.S. 310. Similarly, cases involving the construction of the Federal Rules of Civil or Criminal Procedure, such as this case, are deserving of certiorari review. See Hickman vs. Taylor, 329 U.S. 495; Upshaw vs. United States, 335 U.S. 410; Schlagenhauf vs. Holder, 379 U.S. 104, 109.

The bizarre practice followed by the U.S. District Court in this case has gone uncorrected by the Circuit Court of Appeals. These circumstances implicate the express requirements of the Federal Rules of Criminal Procedure, and therefore implicate appropriate Federal practice and procedure. The departure from the appropriate Federal practice and procedure, as described in Rule 30 of the Federal Rules of Criminal Procedure, should not be condoned. Therefore this Court should grant Petitioner's Writ of

Certiorari in order to restore meaning to Rule 30.

2. The decisions below, insofar as they permit the Court to give a mere fifteen minutes notice for preparation of closing arguments and review of jury instructions in an approximately three week criminal jury trial, so far departed from the accepted and usual course of judicial proceedings, that they require an exercise of this Court's power of supervision.

Perhaps the most egregious and prejudicial aspect of the Court's departure from the accepted and usual course of judicialproceedings, was springing the jury instructions on counsel and proceeding directly to closing arguments with only fifteen minutes recess for preparation. This activity occurred on Thursday afternoon, July 21, 1988, the exact chronology being detailed in the Statement of the Case, supra. The

Court could and should have simply conducted the charge conference on Thursday afternoon, in full and prior to closing, allowed counsel to prepare overnight for closing arguments to commence on Friday morning, July 22, 1988, and let the jury begin deliberations on Friday late morning or early afternoon. In any event, it would likely have been necessary for the jury to have returned on Monday, July 25, 1988 as it did anyway. There was simply no rhyme or reason to have proceeded as hastily as it did, which procedure deprived counsel of an opportunity to consider properly the jury instructions, prepare for closing arguments, or to know which instructions would be given at the time of making his closing argument. The defense counsel was prejudiced in two ways: not being apprised of the jury instructions prior to closing, and not being given adequate time to prepare in light of even those

instructions which were known prior to closing. Even if the Court's proposed rulings on the requested instructions had been covered prior to closing arguments as required by Rule 30, counsel was still given grossly inadequate time to prepare for closing arguments.

The unconscionable procedures forced upon defense counsel in this case are reminiscent of another infamous example of a court in the Middle District of Florida, Tampa Division, being excessively concerned with the time pressures of its case load to the prejudice of a defendant's constitutional right, United States vs. McClain, 823 F.2d 1457 (11th Cir. 1987). In McClain, the Eleventh Circuit held that the Defendant had been denied a fair trial due in large part to the Trial Court's emphasis on an accelerated trial schedule resulting from concern over the heavy case load existing then (and now)

in the Middle District of Florida, Tampa Division. The facts in McClain, which the Eleventh Circuit described as "a classic example of judicial error and prosecutorial misconduct combining to deprive the Defendant of a fair trial", McClain at 1459, are analagous to those in the instant case. The Eleventh Circuit saw fit to reverse Mr. McClain's conviction; it should have done the same in this case. Because it did not, certiorari should be granted to do so.

The unorthodox procedure required by the Trial Court and approved by the Court of Appeals also implicates the Petitioner's Sixth Amendment right to counsel, described in this Court's recent decision, Perry vs.Leeke, 57 U.S.L.W. 4075, (January 10, 1989). The Perry case discussed Gedders vs. United States, 425 U.S. 80 (1976), where this Court held that the Sixth Amendment right to counsel invalidated a Trial Court order

forbidding a Defendant and his attorney to communicate during an overnight trial recess that interrupted the Defendant's appearance on the witness stand. Both Perry and Gedders affirm that where there has been an actual or constructive denial of defense counsel's services, no showing of prejudice is required. The procedure required by the Trial Court in this matter deprived defense counsel of an opportunity to conduct a meaningful consultation regarding trial tactics and strategy with his client at a crucial point in the trial. Had the Court followed a logical and reasonable schedule, which would have permitted counsel an opportunity to confer at length with his client during Thursday evening, with knowledge of what instructions would be given and how closing arguments would appear, no Sixth Amendment violation would have been involved. However, because the Court did require analysis of

jury instructions in preparation of a closing of a three week trial within a fifteen minute period, the Court effectively deprived defense counsel of the opportunity to consult with his client during Thursday evening concerning the numerous tactical and strategic issues that naturally would have been discussed at that point of the proceedings. Depravations of such an opportunity to consult during an overnight recess is very similar to the right to counsel violation found in Gedders. Even though the Defendant's testimony was not interrupted, as it was in Gedders, the gist of the violation is the same: Deprivation of an opportunity to consult during a crucial period of the trial.

The procedures followed by the Trial Court and approved by the Circuit Court of Appeal are clear abuses of discretion which deprived Petitioner of his right to a fair

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to United States Attorney, Middle District of Florida, 500 Zack Street, Suite 400, Tampa, Florida 33602, A. Hechtkopf, Chief Criminal Appeals and Tax Enforcement Policy Section, Tax Division, Department of Justice, Post Office Box 502, Washington, D.C. 20044, and the Solicitor General, Department of Justice, Washington, D.C., 20530 this 21ST day of October, 1989.

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Attorney for Petitioner

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APPENDIX

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APPENDIX

1. Order of Eleventh Circuit Court of Appeals, August 24, 1989

2. Judgment of United States District Court, Middle District Florida, U.S. vs. Suarez, October 17, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

- - - - - - - - - - - - - - -

No. 88-2861

- - - - - - - - - - - - - - -

D. C. Docket No. 88-104

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUILLERMO SUAREZ,

Defendant-Appellant

- -

Appeal from the United States District Court for the Middle District of Florida

- -

(August 24, 1989)

Before FAY and HATCHETT, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

GUILLERMO SUAREZ

8432 Meadow Brook Drive

Largo, Florida 34647

SSN: 263-06-6303

Judgment in a Criminal Case

Case No: 88-104-Cr-T-15(B)

Anthony J. LaSpada

Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

____ guilty ____ nolo contendere or

____ not guilty as to count(s) one, two and three of the indictment.

THERE WAS A:

____ finding ____ verdict of guilty as to counts two and three of the indictment

THERE WAS A:

____ finding ____ verdict of not guilty as to count(s) ____ judgment of acquittal as to

this judgment, and as a Special; Condition of probation the defendant shall, 1. Pay a fine to the United States in the amount of $50,000.00 (FIFTY THOUSAND DOLLARS) within 6 (SIX) MONTHS, and 2. Contribute 500 (FIVE HUNDRED) HOURS of community service per year during the term of probation. Sentence imposed in Count Three to run consecutively to sentence imposed in Count Two.

Execution of the sentence imposed herein is deferred until January 3, 1989 when defendant is notified by the U.S. Marshal as to when, where and to whom he should surrender for execution of such sentence pursuant to the Voluntary Surrender Program.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probations set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with you probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the

probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $___ pursuant to Title 18, U.S.C. Section 3013 for counts(s) _____ as follows:

(offense committed prior to November 1984)

IT IS FURTHER ORDERED THAT counts _____ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

____ The Court orders commitment to the custody of the Attorney General and recommends:

October 7, 1988

Date of Imposition of Sentence

/s/

Signature of Judicial Officer

WILLIAM J. CASTAGNA, U.S. DISTRICT JUDGE

Name and Title of Judicial Officer

October 17, 1988

Date

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

Date

at _____,

the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____

UNITED STATES MARSHAL

By _____

Deputy Marshal